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No. 84-1033

# In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM H. PFLAUMER

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY MEMORANDUM FOR THE UNITED STATES

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5 pp

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Respondent was convicted on 21 counts of mail fraud and a single count of conspiracy to commit mail fraud. The court of appeals ruled that *United States* v. *Agurs*, 427 U.S. 97 (1976), required a new trial because the government had failed to disclose certain evidence to the defense (Pet. App. 17a-46a). The court of appeals also held that the trial judge erred in instructing the jury on the duration of the conspiracy (*id.* at 11a-17a). The court of appeals reversed all 22 of respondent's convictions, but it never explicitly specified which of the errors it discerned was a basis for reversing which of the convictions.

There is no reason to doubt, and respondent does not dispute, that the court viewed its interpretation of *Agurs* as a sufficient basis for reversing all of the convictions. But we demonstrated in the petition (at 5-6 n.2) that the alleged error in the conspiracy instruction could have affected, at

most, only the conspiracy conviction—not respondent's 21 convictions on substantive charges. Respondent's principal contention (Br. in Opp. 10-15) is that, contrary to our submission, the court of appeals' ruling on the conspiracy instruction was an independent basis for reversing all of his convictions. Respondent advances essentially three arguments in support of this contention. None of respondent's arguments is correct.

First, respondent asserts (Br. in Opp. 11-12) that the instruction on conspiracy that he requested would have required the jury to acquit him on all counts if it found he had not joined the conspiracy before the date of the last mailing charged in the indictment. But the phrasing of respondent's proposed instruction is immaterial, because the court of appeals did not hold that the trial court was required to give that instruction. On the contrary, the court of appeals specifically stated (Pet. App. 14a-15a) that the conspiracy instruction actually given by the district court—an instruction that made no reference whatever to the substantive counts—would have been acceptable if the court had not permitted the jury to convict respondent on the basis of evidence that he joined the conspiracy as late as January 1981.

Second, respondent takes issue with our submission that because the jury was not given an instruction permitting it to hold respondent vicariously liable for the substantive offenses committed by his co-conspirators (see *Pinkerton* v. *United States,* 328 U.S. 640 (1946)), any error in the conspiracy instructions could not possibly undermine respondent's convictions on the substantive counts. Respondent asserts (Br. in Opp. 11-13) that the instructions given by the district court would have allowed the jury to convict respondent on the substantive counts on the basis of vicarious liability. But the court of appeals did not mention or even allude to the instructions respondent quotes; it is

therefore evident that the court did not consider these instructions to support a holding that the error in the conspiracy instruction vitiated respondent's 21 substantive convictions.

Moreover, the instructions quoted by respondent bear no resemblance to the standard *Pinkerton* instruction (see 328 U.S. at 645-646 n.6) and, in context, could not have been interpreted by the jury in the way respondent suggests. The trial judge instructed the jury at some length on the substantive counts (C.A. App. A1449-A1456) and then on the charges that the defendants aided and abetted the commission of the substantive offenses (*id.* at A1456-A1457). Respondent does not suggest that any of the instructions on these issues authorized the imposition of vicarious liability on the basis of a co-conspirator's actions or otherwise caused any error with respect to the conspiracy charge to be material to the substantive charges. The trial judge then said to the jury (*id.* at A1458): "Let me talk to you now about conspiracy." The instructions quoted by respondent did no more than clarify for the jury various aspects of the law of conspiracy—for example, the fact that an individual who joins a conspiracy in progress can be convicted on a conspiracy charge even though some of the actions taken pursuant to the conspiracy occurred before he joined (*id.* at A1462-A1466) and that the actions and statements of one conspirator may be attributed to others for purposes of determining the scope of the conspiracy (*id.* at A1467-A1469).[1]

Third, respondent incorrectly asserts that our "present interpretation of the panel's opinion is contrary to" the rehearing petition filed by the government in the court of appeals (Br. in Opp. 14). Since the court of appeals' opinion

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[1]We have lodged a copy of the instructions (C.A. App. A1433-A1484) with this Clerk of the Court.

does not explain whether the supposed error in the conspiracy instruction undermined respondent's convictions on the substantive counts—or how it could have done so—the rehearing petition of course sought clarification on this point. But the statements made in the rehearing petition are fully consistent with the position we now take (Gov't C.A. Reh'g Pet. 14-15):

> [W]hile the panel did not relate whether the error it found vitiated the convictions on the 21 substantive fraudulent counts, any error in the instruction could only have affected the conspiracy count. The jury was not given any vicarious liability instruction as in *Pinkerton* v. *United States,* 328 U.S. 640 (1946), so the conviction[s] on the substantive counts were not dependent on a conspiracy theory. * * * In such circumstances, the requested instruction could not have possibly undermined the convictions on the 21 substantive counts.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition should be disposed of as appropriate in light of the disposition of *United States* v. *Bagley,* cert. granted, No. 84-48 (Nov. 14, 1984).

CHARLES FRIED
*Acting Solicitor General*

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